

2011 IL App (2d) 100250-U
No. 2-10-0250
Order filed September 30, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-3117
)	
JUHNELL C. MORGAN,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justice Bowman concurred in the judgment.
Presiding Justice Jorgensen specially concurred.

ORDER

Held: The trial court's first-stage dismissal of defendant's postconviction petition was proper because the substantive allegations contained in the petition were contradicted by the record and had no arguable basis either in law or in fact. We affirmed the judgment of the trial court.

¶ 1 In August 2009, defendant, Juhnell C. Morgan, filed a petition seeking relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant alleged, *inter alia*, that there was a *bona fide* doubt about his fitness to plead guilty because, at the time of his plea, he suffered from mental problems and was on a mental health drug sedative, which

interfered with his rational thinking. The trial court found defendant's petition frivolous and dismissed it. Defendant now appeals the first-stage dismissal of his postconviction petition. We affirm.

¶ 2 The Act provides a method by which persons under a criminal sentence can assert that their convictions were the result of a substantial denial of their rights under the United States or the Illinois Constitution or both. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. Ligon*, 239 Ill. 2d 94, 103 (2010) (citing *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010)). A postconviction proceeding is a collateral attack on the prior conviction or sentence that does not relitigate a defendant's innocence or guilt. *Ligon*, 239 Ill. 2d at 103 (citing *People v. Evans*, 186 Ill. 2d 83, 89 (1999)).

¶ 3 Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place. *People v. Hansen*, 2011 IL App (2d) 081226, ¶ 18 (2011) (citing *People v. Jones*, 213 Ill. 2d 498, 503 (2004)). A postconviction proceeding that does not involve the death penalty consists of three stages. At the first stage, the defendant files a petition and the trial court has 90 days in which it may review the petition without the input of any party and summarily dismiss it if the court finds it frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *Hansen*, 2011 IL App (2d) 081226, at ¶ 18 (citing *People v. Jones*, 211 Ill. 2d 140, 144 (2004)). To survive summary dismissal, the petition must present only the gist of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *Hansen*, 2011 IL App (2d) 081226, at ¶ 18 (citing *Jones*, 211 Ill. 2d at 144). A petition that has no arguable basis "either in law or in fact" constitutes a petition that is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 11-12. We review *de novo* the trial court's first-stage summary dismissal of defendant's postconviction petition. See *Hodges*, 234 Ill. 2d at 9.

¶ 4 In the present case, defendant's allegations contained in his postconviction petition are contradicted by the record; therefore, summary dismissal was appropriate. See *People v. Deloney*, 341 Ill. App. 3d 621, 626 (2003) (holding that a trial court may summarily dismiss a postconviction petition if its allegations are contradicted by the record). The record reflects that, on August 6, 2008, the trial court conducted a hearing on defendant's negotiated plea agreement with the State. The trial discussed the plea negotiations that occurred between defendant and the State. Defendant answered questions regarding his level of education and his ability to read, write, and understand the proceedings. The trial court inquired into defendant's physical and mental health, and defendant discussed his digestive problem and an anxiety and depression condition. Defendant discussed the medication that he was taking, and twice told the trial court that the medication did not interfere with his ability to think, act, or understand the proceedings. The trial court advised defendant of his legal rights and the rights he was giving up by entering a guilty plea. The State recited a factual basis for the plea. Defendant agreed that he was entering into the negotiated plea of his own free will and was fully informed. He must be held to the assurance. See *People v. Robinson*, 157 Ill. App. 3d 622, 629 (1987) (stating that if a guilty plea is to have any binding effect, the trial court's extensive and exhaustive admonitions and the defendant's acknowledgment must be held to sustain an assertion of involuntariness). Accordingly, we hold that the trial court's first-stage dismissal of defendant's postconviction petition was proper.

¶ 5 In so holding, though, we need to address a matter that arose during the pendency of this appeal. The State had filed a motion to dismiss this case based on defendant's alleged lack of a validly notarized affidavit (see 725 ILCS 5/122-1(b) (West 2008)) and pursuant to this court's holding in *People v. Carr*, 407 Ill. App. 3d 513 (2011). We allowed the State's subsequent motion

to withdraw its motion to dismiss, and thereafter the State filed a motion to cite *Carr* as additional authority; we allowed the State's motion. At oral argument, the State argued that trial courts should review both the procedural requirements as well as the merits when reviewing a defendant's postconviction petition. The State further argued that a trial court's disregard of the procedural requirements of the Act, in other words, when a trial court "looks the other way," promotes disrespect to the Act. The State argued that *Carr* "took the bold step" and recognized the importance of the specific term, "affidavit," when it affirmed the dismissal of the defendant's postconviction petition, and therefore, the State requested this court to affirm on the same basis as *Carr* and not allow defendant's postconviction petition to survive to the second stage.

¶ 6 Contrary to the State's assertion at oral argument, the trial court in the current matter did not "look the other way" when it dismissed defendant's postconviction petition. However, insofar as we have already upheld the trial court's first-stage dismissal of defendant's postconviction petition on the merits, we need not seek out a procedural defect on which to substantively decide the appeal. See *People v. Johnson*, 208 Ill. 2d 118, 129 (2003) (stating that a reviewing court may affirm a trial court's judgment on any ground appearing in the record). Moreover, our supreme court would prefer that we do not. See *People v. Petrenko*, 237 Ill. 2d 490, 505 (2010) (noting that courts need not consider issues where they are not essential to the disposition of the cause or where the result will not be affected regardless of how the issue is decided). We recognize *Carr* as it is a published decision from this court (this author concurring); however, *Carr* does not explain why it chose to address and resolve the appeal based on a procedural defect that was not addressed by the lower court prior to appellate review. See *People v. Sparks*, 393 Ill. App. 3d 878 (2009) (stating that, at the dismissal stage of a postconviction proceeding, the trial court is concerned merely with

determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act). We believe our resolution of the current matter is more consistent with the spirit and purpose of the Act. See *People v. Taylor*, 237 Ill. 2d 356 (2010) (stating that the purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original trial that have not been, and could not have been, adjudicated previously upon direct review). Our method of resolution also comports with our supreme court's long-held view that the Act in general must be " 'liberally construed to afford a convicted person an opportunity to present questions of deprivation of constitutional rights.' " *People v. Rissley*, 206 Ill. 2d 403, 421 (2003) (quoting *People v. Correa*, 108 Ill. 2d 541, 546 (1985)). And finally, under the auspices of fairness, we believe that reviewing and addressing the merits of a postconviction petition provide a more just result to a person under a criminal sentence. See *People v. Bocclair*, 202 Ill. 2d 89, 101-02 (2002) (noting that, even if a postconviction petition is untimely filed but has obvious substantive merit, *i.e.*, that is, if it clearly demonstrates that a prisoner suffered a deprivation of constitutional magnitude, a dutiful prosecutor should waive the procedural defect). For all of these reasons, we decline to apply *Carr* to the circumstances of the present case.

¶ 7 Accordingly, we affirm the judgment of the circuit court of Winnebago County.

¶ 8 Affirmed.

¶ 9 PRESIDING JUSTICE JORGENSEN, specially concurring:

¶ 10 I concur with the majority's conclusion that, based upon the substantive allegations therein, the trial court's dismissal of defendant's postconviction petition was proper. I write separately to express my disagreement with the majority's suggestion that it would be *improper* to address (even as an alternative basis for affirming) the State's main argument on appeal, *i.e.*, that the petition was

properly dismissed because it was not verified by a notarized affidavit as required by section 122-1(b) of the Act and this court's decision in *Carr*.

¶ 11 The majority first concludes that addressing the State's section 122-1(b) argument is not warranted because, where the merits already justify affirming the trial court's dismissal, we should not "seek out" a procedural defect. *Supra* at ¶ 6. On this basis, the majority distances itself from this court's decision in *Carr*, noting that *Carr* did not explain why it chose to address and resolve that appeal based upon a procedural defect not addressed by the lower court. *Id.* Respectfully, I suggest that it was completely unnecessary for *Carr* to do so. As the majority notes, it is well established that this court may affirm a trial court on *any* basis in the record. *Johnson*, 208 Ill. 2d at 129. The fact that, in addition to the substantive basis upon which to affirm, this court might also identify a procedural ground upon which to affirm, is of no import. Further, here, we are not seeking out a procedural defect; rather, the procedural defect is one of the State's primary arguments.

¶ 12 Moreover, citing *Petrenko*, 237 Ill. 2d at 505, the majority suggests that, because we have found a substantive basis for affirming, the State's procedural-defect argument is not essential to the disposition and, therefore, our supreme court would prefer we not address both bases for affirming the petition's dismissal. *Supra* at ¶ 6. However, the majority confuses an advisory analysis with an alternative one. Indeed, the majority's citation to *Petrenko* references that court's determination that a lower-court's commentary about consecutive sentencing became advisory once it had determined that consecutive sentencing did not apply to the defendant. *Petrenko*, 237 Ill. 2d at 505. In contrast, it is entirely proper for an appellate court to provide alternative grounds for its decision. *Petrenko*, 237 Ill. 2d at 518 (Burke, J., dissenting) (noting that it is well established that alternative holdings are not advisory); see also *LeBron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 236 (2010) (noting

that a decision may rely on two or more grounds with neither being relegated to *dicta*); *United States v. Title Insurance and Trust Co.*, 265 U.S. 472, 486 (1924) (“where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both *** each is the judgment of the court and of equal validity with the other”). Here, the question squarely before this court is whether the trial court’s dismissal of the petition was proper, and we may provide alternative bases for concluding that it was. See, e.g., *Carr*, 497 Ill. App. 3d at 515-16 (finding that the failure to provide a notarized affidavit was an *alternative* basis for affirming the petition’s dismissal); *People v. Davis*, 382 Ill. App. 3d 701, 711 (2008) (where this court noted “we accept both of the State’s alternative bases for upholding the trial court’s dismissal of defendant’s postconviction petition”).

¶ 13 Finally, while the majority suggests that, under the “auspices of fairness,” it is unfair to dismiss a petition under the Act for procedural defects (*supra* at ¶ 6), postconviction petitions are routinely dismissed for procedural defects. See, e.g., *People v. Johnson*, 154 Ill. 2d 227, 240 (1993) (postconviction petitions may generally be dismissed without a hearing for failure to attach affidavits or other supporting documents); see also *People v. Delton*, 227 Ill. 2d 247, 258 (2008) (postconviction petitions may be dismissed for failure to comply with the Act).

¶ 14 For the foregoing reasons, I would address the State’s argument that the trial court properly dismissed the petition because defendant failed to provide a notarized affidavit as required by section 122-1(b). Including this discussion as an alternative basis for affirming is entirely proper and is consistent with this court’s decision in *Carr*. Further, addressing the State’s argument, I would conclude that defendant’s purported affidavit, which was not notarized, does not meet section 122-1(b)’s requirements and is, therefore, is invalid. See 725 ILCS 5/122-1(b) (West 2008) (“[t]he proceeding shall be commenced by filing with the clerk of the court in which the conviction took

place a petition (together with a copy thereof) verified by affidavit”); *Carr*, 407 Ill. App. 3d at 515 (“affidavits filed pursuant to the Act must be notarized to be valid”); and *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). In doing so, I would reject defendant’s argument that his certification under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2008)) sufficiently satisfied the notarization requirement of section 122-1(b). Section 1-109, by its terms, applies only to the Code of Civil Procedure. 735 ILCS 5/1-109 (West 2008) (defining requirements for verification by certification as it applies to documents filed “in this Code”). Postconviction petitions, however, are governed by the Act (725 ILCS 5/122-1 *et seq.* (West 2008)), which is part of the Code of Criminal Procedure of 1963 (725 ILCS 5/100-1 *et seq.* (West 2008)). As a result, a section 1-109 certification is not a valid substitute for an affidavit under the Act. Instead, the Act requires an actual “affidavit”—which, by definition, is sworn before a person who has authority to administer oaths. See *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002); *People v. Hansen*, No. 2-08-1226, slip op. at 12 (Ill. App. May 27, 2011) (Jorgensen, P.J., dissenting). Therefore, where section 1-109 does not apply and defendant failed to provide a properly-notarized affidavit, his inclusion of a section 1-109 certification did not cure the defect and dismissal of the petition was proper.

¶ 15 For the foregoing reasons, I specially concur.